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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-500

LOWELL M. BIRRELL,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER LOWELL M. BIRRELL

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This reply memorandum is submitted pursuant to Rule 24, Supreme Court Rules, by petitioner Lowell M. Birrell in further support of his petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

Petitioner submits (1) it was error to have denied him a hearing to sustain his charge that the grand jury never passed on the terms of the indictment, (2) that the invocation of the Fifth Amendment privilege against self-incrimination by a government witness in response to certain questions held by the trial court to be material (Tr. 860) on cross-examination denied to petitioner the right to confrontation, and (3) that the giving of an "Allen" charge under any set of circumstances was prejudicial.

We add the following comments in response to the Solicitor General's memorandum in opposition.

I

The government has already admitted in this case (May 25, 1970 transcript p. 6) that the grand jury minutes would not reflect one way or the other, whether the grand jury passed on the actual terms of the indictment. The Solicitor General, in his memorandum in opposition (p. 3), asserts without any reference to the actual trial record that "we are advised that the custom in the Southern District of New York is for the Assistant United Attorney to submit a draft indictment to the grand jury and then leave the room before a vote is taken."

Of course, this is rhetoric.

The fact remains that the Solicitor General has failed to do the simple, decent and required act of either denying the factual charge of the petition that "the" indictment in this particular was never in fact submitted to the grand jury, or to admit to the truth of petitioner's charge under *Brady* v. *Maryland,* 373 U.S. 83 (1963).

The law is very clear. If there is a presumption, it is against the government in this kind of situation. The Solicitor General's statement as to the practice below is completely contrary to fact in this particular case. A hearing as to the truth should be held, or the government should disclose the failure of the grand jury to vote on "this" indictment. *Gaither* v. *United States,* 413 F. 2d 1061 (D.C. Cir., 1969).

II

As to the invocation of the Fifth Amendment privilege by a government witness, the trial court held (Tr. 860) that the matter inquired into was material. So did the government (Tr. 880), under *Brady* v. *Maryland,* 373 U.S. 83 (1963) and *Napue* v. *Illinois,* 360 U.S. 264 (1959). The Court of Appeals based its opinion on the "collateral"

issue theory (Pet. App. A, at p. 3a, *et seq.*). It is the clear law of the case, as established by the trial court, that the question of the ownership of the Drug Products stock was "material." Therefore, it could not be "collateral." The two words are mutually exclusive.

III

As to the "Allen" charge, it is conceded by the Solicitor General that several circuits have recently determined to eliminate it for the future (Solicitor General's memorandum in opposition, at p. 3).

Whatever the trial judge or the Court of Appeals may have thought as to the propriety of the "Allen" charge in this case, if in fact the "Allen" charge is wrong, it justifies a reversal, and not as the Solicitor General proposes, a new procedure for the future.

Otherwise, we have the petitioner now serving two years' imprisonment [1] by accident of geography, by having been tried in the Second Circuit rather than, as the Solicitor General suggests, by way of example, the District of Columbia Circuit.[2] See, also, *United States* v. *Fioravante*, 412 F. 2d 407 (3rd Cir., 1969).

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[1] The petitioner commenced serving his sentence November 11, 1971, his application for a stay of the mandate being denied by Associate Justice Thurgood Marshall on November 9, 1971.

[2] The jury was divided 8-4 for acquittal when the charge was given.

CONCLUSION

It is respectfully submitted that the Supreme Court must properly grant review on certiorari "[W]here a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter;" (Rule 19, Supreme Court Rules).

Yours, etc.,

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